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No. 99

In the Supreme Court of the United States

OCTOBER TERM, 1962

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

BOSTON AND MAINE RAILROAD, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO MOTION TO AFFIRM

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MAY 1962.

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 925

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

BOSTON AND MAINE RAILROAD, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO MOTION TO AFFIRM

Our brief in opposition to the Motion to Affirm will deal only with certain contentions of the appellees which by themselves show that plenary consideration by this Court is warranted.

1. The Motion to Affirm filed by the appellees does not even controvert our submission that the economic impact of the decision below upon the North Atlantic ports and the railroads serving them, without more, warrants plenary review of that decision by this Court.

2. The appellees state (Motion to Affirm pp. 20–21) that:

> * * * In a Section 3(1) complaint proceeding, the Commission, as the Court recognizes, could

> properly find that a rate difference maintained between different points is justified and proper where greater distance, and its concomitant greater costs to the carrier, are shown as a matter of record. But the Court goes on to point out the irrelevance of a finding as to higher costs due to greater distances in a Section 15(7) proceeding, as here, where the carriers deem the absorption of such higher costs necessary if they are to effectively compete at rates otherwise lawful.

In so stating, the appellees put in blunter terms than the court below the proposition that the Commission, in exercising its investigation and suspension powers under Section 15(7) of the Interstate Commerce Act (49 U.S.C. 15(7)) may not take into account comparative distances and costs in determining the lawfulness of rates to and from the various ports on export-import traffic, but may do so in a proceeding instituted by a complaint alleging a violation of Section 3(1). This amounts to saying that the railroads serving the northern tier ports (New York, Boston, Albany and Portland) have a statutory right to put into effect reduced rates which violate Section 3(1) by creating undue preference and prejudice as between the northern tier ports and the southern tier ports, and to maintain such unlawful rates until they are found to be unlawful in a separate proceeding several years later. This contention is inconsistent with any conceivable standard of effective regulatory procedure. It flies in the teeth of the express provision of Section 15(7) that in proceeding under that section "the Commission may make such order with

reference thereto as would be proper in a proceeding initiated after it had become effective," i.e. in the complaint procedure referred to by appellees.

3. The Motion to Affirm also puts more clearly than the decision below the real thrust of this litigation, in the statement (at p. 23) that:

> It is fundamental that if the appellee railroads lawfully reduce their rates to a basis of equality with the rates of appellant railroads as a matter of necessity in order to meet competition, then a retaliatory reduction by appellants must be condemned as "unnecessary to meet competition".

In brief, the appellees candidly equate "freedom to compete" with enforced rate equalization. The quoted statement was coupled with a reference to *New York Central R. Co.* v. *United States*, 99 F. Supp. 394 (1951) affirmed 342 U.S. 890, and the subsequent decision of the Commission in *Export Grain from Buffalo to New York*, 292 I.C.C. 647 (1954).

However, as pointed out by the District Court in *New York Central Railroad Co.* v. *United States*, *ibid.*, at p. 403 the short tariff-rou[illegible] distance from Buffalo, N.Y., the origin, to New York was substantially the same as those to Baltimore and Philadelphia, and the working distance from Buffalo to New York was less than the like distance to Baltimore, and only slightly more than the like distance to Philadelphia. In the present proceeding, the average short-line distance from the affected territory to Boston is 223 miles greater than to Baltimore

and 172 miles greater than to Philadelphia, and to New York it is 106 miles greater than to Baltimore and 54 miles greater than to Philadelphia. It is one thing to say that distance from Buffalo to the various North Atlantic ports did not vary sufficiently to permit the southern tier ports to put into effect an offsetting rate reduction for the purpose of preventing rate equalization on export grain moving through the North Atlantic ports. It is another thing to assert, as appellees do, that as a matter of law the distance and cost advantages of the railroads serving the southern tier ports on the traffic here involved may not be reflected in reduced rates which would result in maintaining a rate differential at a lower rate level.

CONCLUSION

We submit, therefore, that the appellees' Motion to Affirm clearly demonstrates that the decision below poses substantial questions warranting plenary consideration by this Court, and that the Motion should be denied.

Respectfully submitted,

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MAY 1962.